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13 THE LOS ANGELES GAY AND LESBIAN  
COMMUNITY SERVICES CENTER

14 IN THE UNITED STATES DISTRICT COURT  
15 CENTRAL DISTRICT OF CALIFORNIA

16 The Los Angeles Gay and Lesbian  
Community Services Center,

17 Plaintiff,

18 vs.

19 Internal Revenue Service,

20 Defendant.  
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) Case No. CV06-6122-DSF (FMOx)

) PLAINTIFF THE LOS ANGELES  
) GAY AND LESBIAN  
) COMMUNITY SERVICES  
) CENTER'S NOTICE OF MOTION  
) AND MOTION FOR ATTORNEYS'  
) FEES AND LITIGATION COSTS;  
) MEMORANDUM OF POINTS  
) AND AUTHORITIES IN SUPPORT  
) THEREOF

) Date: January 22, 2008

) [Declarations of Dean Hansell,  
) Dorothy Black, Mark Nagle, Heather  
) Capell, Boaz Green, Barrett Litt and  
) John Quinn filed concurrently]

1 TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that, at such time as the matter may be heard if a  
3 hearing is ordered in this matter, before the Honorable Dale S. Fischer, United States  
4 District Judge, in Courtroom 840 of the United States District Court, Roybal Federal  
5 Building and Courthouse, 255 East Temple Street, Los Angeles, California, Plaintiff  
6 the Los Angeles Gay & Lesbian Community Services Center will and hereby does  
7 move for an order establishing the amount of attorneys' fees and costs under the  
8 Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(a)(4)(E).

9 This motion is based upon this Notice, the accompanying Memorandum of  
10 Points and Authorities, declarations and exhibits, all pleadings and papers filed in this  
11 action, and upon such evidence as may be presented at a hearing of this motion.

12 Dated: January 23, 2008

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Heather L. Capell (not admitted in California)  
Boaz I. Green (not admitted in California)  
DEWEY & LEBOEUF LLP

15 By: Dean Hansell / nym

17 Attorneys for Plaintiff  
18 **THE LOS ANGELES GAY AND**  
19 **LESBIAN COMMUNITY SERVICES**  
20 **CENTER**

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## MEMORANDUM OF POINTS AND AUTHORITIES

### I. INTRODUCTION

Plaintiff, the Los Angeles Gay and Lesbian Community Services Center (the "Center"), is eligible for, and entitled to, attorneys' fees and litigation costs, incurred in its litigation with Defendant Internal Revenue Service ("IRS"), under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(a)(4)(E) and now moves for an award of such fees and costs. On March 21, 2005, the Center sent separate information requests under 5 U.S.C. § 552 of FOIA to five IRS locations, seeking documents related to its application for 501(c)(3) tax-exempt status. In violation of its duties under the FOIA, the IRS failed to conduct any search for responsive documents until after the Center was forced to file suit on September 26, 2006. Further, it was not until January of 2007 (20 months after the FOIA requests were sent and 4 months after the suit was filed) that the IRS produced any responsive documents. Additionally, as this Court found in its August 27, 2007 Order Denying Defendant IRS's Motion for Summary Judgment ("the Order"), even the searches that the IRS conducted after the litigation commenced were inadequate under FOIA. This Court therefore ordered the IRS to conduct additional searches for documents.

Because the Center was forced to bring this action in order to receive a response to its FOIA requests and because the IRS failed to conduct an adequate search for responsive documents even after the litigation commenced, *pro bono* counsel for the Center has devoted significant attorney time, and incurred significant litigation costs in representing the Center in this matter. Counsel's services included, among other things: drafting and filing the Complaint, communicating with the Center about developing a strategy, retrieving and producing documents to the IRS, reviewing the IRS's document productions, conducting 30(b)(6) depositions of two IRS employees in Washington, D.C., responding to a late-filed IRS Motion for Summary Judgment, preparing for trial, preparing for and attending two telephonic settlement conferences, and negotiating the language of the Court ordered stipulation. The Center now moves

1 for an order awarding attorneys' fees and litigation costs incurred by its *pro bono*  
2 counsel.

## 3 II. SUMMARY OF FACTS

4 On March 21, 2005, the Center, through its attorneys, LeBoeuf, Lamb, Greene  
5 & MacRae LLP (now Dewey & LeBoeuf LLP), sent FOIA requests to IRS offices in  
6 Cincinnati, Ohio ("Cincinnati Office"), Ogden, Utah ("Ogden Office"), Fresno,  
7 California ("Fresno Office"), Laguna Niguel, California ("Laguna Office"), and  
8 Washington, D.C. ("Washington Office") seeking documents related to its application  
9 for 501(c)(3) tax-exempt status, the original denial letter, subsequent ruling letter  
10 granting tax-exempt status with certain restrictions, and the reissued ruling letter  
11 removing these restrictions. (Order at 2.) The Center did not receive any responsive  
12 documents from the IRS for over 18 months. During this period, Center's counsel sent  
13 letters to IRS offices urging them to respond to the Center's FOIA requests, but no  
14 responsive documents were received. (April 11, 2005 letter from Dean Hansell to  
15 Kathlyne Morris; April 13, 2005 letter from Dean Hansell to Marla McKenzie,  
16 attached as Ex. 1 to Declaration of Mark Nagle in Support of Plaintiff's Motion for  
17 Attorneys' Fees and Litigation Costs ("Nagle Decl.".) Thus, the Center was forced to  
18 sue the IRS on September 26, 2006. (Order at 2.) The IRS admits that it did not  
19 conduct a search for documents related to the Center's FOIA request until after this  
20 litigation was filed. (Mikolashek 5/10/07 Deposition at 110:22-114:6, Ex. 21 to  
21 Declaration of Mark Nagle in Opposition to Defendant's Motion for Summary  
22 Judgment.; Declaration of Adrienne Mikolashek in Support of Defendant's Motion for  
23 Summary Judgment ¶¶ 12-17 (pages 5-6) ("Mikolashek Decl.".)

24 After the Center submitted its FOIA requests, the IRS's Ogden, Fresno, and  
25 Laguna Offices, in violation of FOIA, declined to conduct the required searches and  
26 instead merely referred the FOIA requests to the Exempt Organizations Determination  
27 Office in Cincinnati. (Order at 2-3.) The Ogden, Fresno, and Laguna Offices took no  
28 further action on the Center's requests. (*Id.* at 2.) Even after the Center filed the

1 lawsuit, the IRS initially conducted searches of only its Washington and Cincinnati  
2 Offices. (*Id.* at 3.) The IRS's search of its Washington Office located 29 pages of  
3 responsive documents, which it turned over to the Center on January 3, 2007, nearly 4  
4 months after the litigation commenced. (*Id.*) Because the Center was organized and  
5 located in California, John Bailey, a Supervisory Internal Revenue Agent in the  
6 Cincinnati Office, asked the IRS's office in El Monte, California ("El Monte Office")  
7 if any documents that should have been transferred to the Cincinnati Office had been  
8 retained there. (*Id.* at 3.) He was told that no such documents were located in the El  
9 Monte Office. (*Id.*) The IRS, however, failed to provide a detailed declaration  
10 describing the search conducted at the El Monte Office. (*Id.* at 6.)

11 In the IRS's responses to discovery requests on February 12, 2007, the IRS  
12 agreed in writing to produce supplemental search declarations to the Center within 10  
13 days, which it failed to provide within the time specified. It was not until March 28,  
14 2007, that the IRS produced any of the promised supplemental search declarations  
15 meant to potentially obviate the need for depositions. However, at that time, the IRS  
16 failed to produce a declaration for Adrienne Mikolashek, who coordinated the  
17 searches. In the absence of sufficient declarations detailing the searches that the IRS  
18 conducted, the Center proceeded with 30(b)(6) depositions of IRS designees in  
19 Washington, D.C. These depositions required counsel to involve additional attorneys  
20 in its local Washington, D.C. office. The IRS did not inform the Center's counsel that  
21 it would be providing two deponents and did not inform counsel of their identities  
22 until a day before the deposition. Moreover, to accommodate the schedules of the  
23 IRS's designees, Mr. Bailey and Ms. Mikolashek, counsel for the Center agreed to cut  
24 short its deposition time with Ms. Mikolashek and schedule a second session with her.  
25 At the second session on May 10, 2007, the IRS produced another 4 responsive  
26 documents to the Center (Declaration of Dean Hansell in Opposition to Defendant's  
27 Motion for Summary Judgment ¶ 10.)  
28

1 At the Local Rule 7-3 conference of counsel on June 20, 2007, the Center  
2 detailed for the IRS why it needed additional information regarding the searches  
3 conducted and requested that the IRS provide supplemental declarations to assist the  
4 Center in determining the adequacy of the searches conducted. The IRS's attorney  
5 said that they intended to file a motion for summary judgment and have a court  
6 declare that the search conducted was adequate. In a letter sent to the IRS on June 22,  
7 2007, counsel for the Center urged the IRS not to file a motion on the adequacy of the  
8 search and instead provide the requested declarations to help establish the adequacy of  
9 the search conducted. (June 22, 2007 Letter from Dean Hansell to Gerald Role,  
10 attached as Ex. 2 to Nagle Decl.) However, the IRS proceeded to file a late motion for  
11 summary judgment, arguing that it conducted a reasonable search for documents and  
12 thereby discharged its duties under FOIA, which the Center was forced to oppose.  
13 (Order at 4.) This Court denied the IRS's motion in its August 27, 2007 Order, finding  
14 that the IRS's "own evidence suggested that the search conducted was not reasonable."  
15 (*Id.* at 8.) This Court found, among other things, that responsive documents may be  
16 located "either in offices to which [the Center] directed its request or in the offices of  
17 IRS senior management." (*Id.* at 7-8.) Consequently, this Court, in the Civil Minutes  
18 of the August 27, 2007 Hearing on Defendant's Motion for Summary Judgment,  
19 ordered that the IRS conduct further searches for the requested documents pursuant to  
20 a joint stipulation to be entered into by the Parties.

21 In order to facilitate the Parties' compliance with this Court's Order, the Center  
22 sent a proposed stipulation to the IRS on September 12, 2007, based largely on the  
23 language of the Order. The Center's main objective in drafting the stipulation was to  
24 ensure that the additional searches the IRS would conduct would be both adequate and  
25 well documented, such that any future disputes regarding the IRS's compliance with  
26 its statutory obligations to respond to the Center's FOIA requests would be averted.  
27 The Center anticipated that, based on the Order's clarity about the searches to be  
28 conducted, the Parties would readily agree to the stipulation's language. However,

1 despite the Center's efforts to expedite the process, the IRS took over 2 months to  
2 agree to the filed stipulation's language. During this period, significant attorney time  
3 was devoted to activities related to the stipulation, including lengthy telephonic  
4 meetings between the Parties and the exchange of numerous drafts of the stipulation.  
5 On November 15, 2007, over 2 months after the Court's August 27, 2007 Order, the  
6 Parties were finally able to file a stipulation as to the searches to be conducted.

7       The Parties have attempted to settle the issue of attorneys' fees and litigation  
8 costs prior to the Center's filing of this motion. The Parties had an initial telephonic  
9 settlement conference on September 11, 2007, with Magistrate Judge Fernando  
10 Olguin, where the IRS appeared willing to enter settlement negotiations on the issue  
11 of attorneys' fees and litigation costs. Therefore, at the telephonic settlement  
12 conference Magistrate Judge Olguin instructed the Center to provide a settlement  
13 demand letter to the IRS, to which the IRS was to respond. Magistrate Judge Olguin  
14 scheduled a further settlement conference for October 4, 2007 (Civil Minutes of  
15 September 11, 2007 Telephonic Settlement Conference 7, attached as Ex. 3 to Nagle  
16 Decl.) The Center and the IRS had a final telephonic settlement conference with  
17 Magistrate Judge Olguin on October 4, 2007, where the Parties agreed that a  
18 settlement of the issue was not possible. (Civil Minutes of October 4, 2007  
19 Telephonic Settlement Conference, attached as Ex. 4 to Nagle Decl.)

### 20       **III. ARGUMENT**

21       The Center is both eligible for, and entitled to, attorneys' fees and litigation  
22 costs under 5 U.S.C. § 552(a)(4)(E). Under FOIA, "[t]he court may assess against the  
23 United States reasonable attorney fees and other litigation costs reasonably incurred in  
24 any case under this section in which the complainant has substantially prevailed." 5  
25 U.S.C. § 552(a)(4)(E). This fee-shifting provision helps ensure that agencies properly  
26 perform their duty to disclose government information to the public, thereby  
27 encouraging a policy of open government. *See, e.g., Northcross v. Bd. of Educ. of*  
28 *Memphis City Schs.*, 412 U.S. 427 (1973) (fee-shifting provision encourages

1 individuals to seek judicial relief for the purpose of vindicating national policy);  
 2 *Cuneo v. Rumsfeld*, 553 F.2d 1360, 1363-1364 (D.C. Cir. 1977) (fee-shifting provides  
 3 incentive to government agencies to comply with FOIA requests); *Goldstein v. Levi*,  
 4 415 F. Supp. 303, 305 (D.D.C. 1976) (fee-shifting provision helps ensure that  
 5 agencies properly perform their duty to disclose government information to the  
 6 public). In order to be awarded attorneys' fees, a complainant must establish both (1)  
 7 eligibility for and (2) entitlement to fees. *See Long v. IRS*, 932 F.2d 1309, 1311-13  
 8 (9th Cir. 1991); *see also O'Neill, Lysaght & Sun v. Drug Enforcement Admin.*, 951  
 9 F.Supp. 1413, 1418 (C.D. Cal. 1996).

10 *Pro bono* counsel is authorized to receive attorneys' fees and litigation costs  
 11 under Section 552(a)(4)(E) of FOIA. *See Rosenfeld v. FBI*, 859 F.2d 717, 723 (9th  
 12 Cir. 1988); *see also U.S. v. \$12,248 U.S. Currency*, 957 F.2d 1513, 1521 (9th Cir.  
 13 1991) (award of attorneys' fees to *pro bono* counsel appropriate as means to ensure  
 14 adequate legal representation to litigants); *Powell v. Dep't of Justice*, 569 F. Supp.  
 15 1192 (N.D. Cal. 1983) (counsel entitled to compensation over lodestar amount to  
 16 compensate for risk assumed when representing a client *pro bono*).

17 **A. The Center is Eligible for Attorneys' Fees and Litigation Costs**  
 18 **Because it has "Substantially Prevailed" in the Litigation**

19 The Court may assess against the United States reasonable attorneys' fees and  
 20 other litigation costs reasonably incurred in any case under 5 U.S.C. § 552(a)(4)(E) in  
 21 which the complainant has "substantially prevailed." *Church of Scientology of*  
 22 *California v. U.S. Postal Serv.*, 700 F.2d 486, 489 (9th Cir. 1983) ("if the facts show  
 23 that the plaintiff has substantially prevailed on his or her FOIA action, then such party  
 24 is eligible for an award of attorney's fees"); *accord Weatherhead v. U.S.*, 112 F. Supp.  
 25 2d 1058, 1064 (E.D. Wash. 2000). A party "substantially prevails" where (1) the  
 26 FOIA action was "reasonably necessary" to obtain the information sought; and (2) the  
 27 action had a "substantial causative effect" on delivery of the information. *Exner v.*  
 28 *Federal Bureau of Investigation*, 443 F.Supp. 1349, 1353 (S.D. Cal. 1978), *aff'd*, 612

1 F.2d 1202 (9th Cir. 1980); *accord Long*, 932 F.2d at 1313. However, a plaintiff need  
 2 not win complete relief to have "substantially prevailed." A prevailing party is one  
 3 who has been awarded some relief by a court. *See, e.g., Buckhannon Bd. & Care*  
 4 *Home v. W. Va. Dep't of Heath & Human Res.*, 532 U.S. 598, 603 (2001).<sup>1</sup> Even  
 5 where no documents are released, a plaintiff may be deemed to have "substantially  
 6 prevailed" if the suit compels an agency to comply with the law. *Halperin v. Dep't of*  
 7 *State*, 565 F.2d 699, 706 n.11 (D.C. Cir. 1977).

8 Here, the Center is eligible for attorneys' fees and litigation costs because this  
 9 litigation was "reasonably necessary," and had a direct causative effect on the delivery  
 10 of information. Moreover, this Court's Order required the IRS to conduct additional  
 11 searches, thereby altering the legal relationship between the Parties.

12 i. **The Center's Filing of this Legal Action Was Reasonably**  
 13 **Necessary to Obtain the Information Sought.**

14 In determining whether a legal action is "reasonably necessary" to obtain the  
 15 information sought, courts consider (1) the length of time between the plaintiff's  
 16 initial request for information and plaintiff's filing of the suit, and (2) whether there  
 17 was a reasonable explanation for the government's delay in turning over the requested  
 18 information prior to litigation. *Weatherhead*, 112 F. Supp. 2d at 1064. Reasonable  
 19 necessity generally exists where the defendant agency would not have searched for  
 20 files or released them in the absence of litigation. *Church of Scientology of California*  
 21 *v. Harris*, 653 F.2d 584, 588 (D.D.C. 1981). This is true even where the agency  
 22 discloses the information voluntarily after litigation has begun. *See, e.g., Goldstein*,  
 23 415 F.Supp. at 305 (purpose of fee provision would be defeated if plaintiffs were  
 24 forced to forfeit their claim upon surrender of materials before formal action by  
 25 judge). Courts also consider "whether the agency, upon actual and reasonable notice

26  
 27 <sup>1</sup> In *Buckhannon*, the Supreme Court, in interpreting the meaning of the word "prevailed," rejected a theory based on the  
 28 causative effect of the litigation because it "allows an award where there is no judicially sanctioned change in the legal  
 relationship of the parties." 532 U.S. at 603. The Court instead held that a "'prevailing party' is one who has been  
 awarded some relief by the court." *Id.* This casts some doubt on the viability of the causative effect or catalyst theory.  
 However, the Ninth Circuit has yet to apply the *Buckhannon* standard. Thus, here we apply both standards.

1 of the request, made a good-faith effort to search out the material and to pass on  
 2 whether it should be disclosed.” *Church of Scientology of California v. U.S. Postal*  
 3 *Serv.*, 700 F.2d at 491 (9th Cir. 1983).

4 Here, the IRS did not make a good faith effort to search for requested  
 5 documents and comply with the FOIA's mandates. The Center waited to file its  
 6 Complaint until September 26, 2006 – a year and a half after its FOIA requests were  
 7 sent. It was not until after the Center filed its Complaint that the IRS began to search  
 8 for responsive documents. (*See* Order at 2-3; Mikolashek 5/10/07 Deposition at  
 9 110:22-113:8, Ex. 21 to Declaration of Mark Nagle in Opposition to Defendant's  
 10 Motion for Summary Judgment; Declaration of John Bailey in Support of Defendant's  
 11 Motion for Summary Judgment; Declaration of Darla Trilli in Support of Defendant's  
 12 Motion for Summary Judgment.) The IRS has provided no explanation for why a  
 13 search was not conducted in the 18 months prior to the Center's filing of this litigation.  
 14 Therefore, there is no evidence that the IRS "would have searched for files or released  
 15 them in absence of litigation." *Church of Scientology of California v. Harris*, 653  
 16 F.2d at 588. Further, the IRS failed to make a good faith effort to search for  
 17 documents even after this litigation commenced. This Court found that the IRS's  
 18 search for documents after the litigation commenced was inadequate under FOIA.  
 19 (Order at 8.) Thus, it is clear that this litigation was "reasonably necessary" to obtain  
 20 the information the Center is entitled to under FOIA.

21 ii. **The Center's Filing of this Legal Action Caused the Delivery of**  
 22 **the Requested Information.**

23 The second factor courts consider in determining eligibility is whether a  
 24 plaintiff's FOIA action caused the delivery of requested information. *Exner v. FBI*,  
 25 443 F. Supp. at 1353. A causal connection is established where documents are  
 26 released in conjunction with a court order. *See Church of Scientology Western U.S. v.*  
 27 *IRS*, 769 F. Supp. 328, 330-331 (C.D. Cal. 1991); *see also Guam Contractors Ass'n v.*  
 28 *U.S. Dep't of Labor*, 570 F. Supp. 163, 165 (N.D. Cal. 1983) (release of documents by